

## Legal Alert

July 15, 2013

Michael R. King  
[mking@gblaw.com](mailto:mking@gblaw.com)  
602-256-4405

### **QUESTION: CAN I REALLY BE SUED FOR GIVING STUDENTS OPPORTUNITIES AS UNPAID INTERNS?**

**ANSWER: THE FAIR LABOR STANDARDS ACT REQUIRES THAT "EMPLOYEES" WHO DO NOT MEET THE REQUIREMENTS TO BE "TRAINEES" MUST BE PAID APPROPRIATELY.**

Young people often seek unpaid internships as a means of building resumes, gaining valuable experience, and meeting prospective employers. Unpaid internships may help businesses recruit and train future employees. Nevertheless, the Fair Labor Standards Act may mandate that interns be paid. Employers need to comply with complicated, difficult, and inconsistent rules for their interns to qualify as unpaid "trainees." No wonder many employers refuse to provide internship opportunities anymore!

#### ***The Black Swan Song for Unpaid Interns?***

Eric Glatt, Alexander Footman, Kanene Gratts, and Eden Antalik all worked for Fox Searchlight Pictures Inc. or its subsidiaries. Messrs. Glatt and Footman worked as unpaid interns on production of the film *Black Swan*. Kanene Gratts was an unpaid intern working in the production of the film *500 Days of Summer* and Eden Antalik was an unpaid intern at the corporate offices of Fox Searchlight Pictures. After their internships ended, they sued Fox Searchlight Pictures and some of its subsidiaries claiming they "were victims of a common policy of using unpaid interns to perform work that required them to be paid."

In *Glatt v. Fox Searchlight Pictures, Inc.*, \_\_\_ F.Supp.2d \_\_\_ (S.D.N.Y. 2013), the plaintiffs alleged violations of the Federal Fair Labor Standards Act, the New York Labor Law, and the California Unfair Competition Law. The court ruled that Messrs. Glatt and Footman were "employees" covered under the Fair Labor Standards Act and the New York Labor Law.

The court also granted Eden Antalík's motions for class certification on the New York Labor Law and Fair Labor Standards Act claims. While the amount of potential damages cannot yet be determined, the court noted "that there are at least 40 class members." So, the amount of unpaid wages and penalties could be substantial.

### ***What Are the Rules to Follow to Avoid Liabilities for Unpaid Internships?***

The U.S. Supreme Court has said that the Fair Labor Standards Act language "suffer or permit to work" shouldn't be interpreted to make people working only in their own self-interests employees of those providing training or instruction. The U.S. Department of Labor Fact Sheet #71 (April 2010) lists six criteria for unpaid internships as follows:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In the *Fox Searchlight Pictures* case the court said the interns did not receive training similar to an educational environment. Although the interns obtained resume listings and job references, the internships were not "intentionally structured to benefit them." The court also said the interns were displacing regular employees and Searchlight was obtaining immediate advantage from the unpaid work. There was no evidence whether the interns were entitled to jobs at the end of the internships. Finally, even though the interns understood that they would not be paid, the Fair Labor Standards Act "does not allow employees to waive their entitlement to wages."

While the U.S. District Court in New York applied the Department of Labor checklist, it noted that some Federal Circuits apply a more subjective test called the "primary beneficiary" test for unpaid internships. The "primary beneficiary" test depends on whether the benefits to the intern outweigh the benefits to the business. In other words, no clear guidance is universally available as to whether your unpaid internship program is exempt from the Fair Labor Standards Act compensation requirements.

As a result of the ruling, Fox Searchlight Pictures will undoubtedly be paying a lot of interns for what they had agreed would be unpaid training. If you are considering a program to pay learners or apprentices less than minimum wage, or if you are considering an unpaid internship program you should structure the program carefully. After all, you want to avoid a financial *Black Swan*-song after *500 Days of Summer* internships.

Personnel issues are complicated and noncompliance can be costly.  
Please call me if you need help with employment matters.

This article may be distributed with attribution but may not be excerpted or modified without the permission of the author.  
Copyright © 2013.